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No. 04-1530
(consolidated with 04-1528, 04-1697)

In The
Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM SORRELL, *et al.*, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Reply Brief for Petitioners Vermont Republican State Committee, et al.

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Argument

I. The State Has Failed To Demonstrate a Corruption Problem in Vermont That Would Justify Such Low Contribution Limits.

The State correctly points out that "[t]he gravity of the 'evil' discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." Sorrell Br. 30 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950). Here, however, the contribution limits fail this test, since the gravity of the evil, corruption, when discounted by its probability, which the record has shown is non-existent, makes Vermont's exceedingly low contribution limits wholly unnecessary.

The State presents a few instances which they erroneously claim shows perceived undue influence of contributions, and no evidence of any actual corruption. Instead, Respondents' Briefs are filled with general, conclusory statements and hyperbole and cite not one witness who is able to name a specific officeholder corrupted by low contributions. Instead, the evidence shows that Vermont is considered a "clean" state in regard to elections and is certainly not the most corrupt state in the Nation that would be necessary to justify the lowest contribution limits in the country.

Because of this lack of actual evidence, Respondents attempt to bolster their claim by two techniques, by repetition and by intermingling the sparse trial testimony with numerous citations to newspaper articles[1] and

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[1]The mere fact that a reporter or editor publishes an article alleging corruption does not prove that there is even a reasonable perception that such corruption exists.

> If we were to allow the charges of journalists automatically to create a presumption that corruption exists or that people believe corruption exists, a group of writers, no matter how unlikely the tales they tell, could rescue statutes otherwise

to various exhibits containing out-of-court statements not subject to cross-examination. Such non-sworn-to material should be given little weight in determining whether Vermont is a state plagued by corruption and should not be allowed to substitute for the proof the State is obligated to present. This lack of proof occurs in spite of the fact that Vermont was then operating under the prior, much larger, $2000 per election cycle contribution limits. It follows, then, that the State has not shown that the new $200-400 contribution limits are justified. In any event, Vermont is only claiming "privileged access" and the record shows that all Vermont citizens enjoy access to their elected officials, so there is nothing "privileged" about it.

A. The specific examples Respondents cite in an attempt to show corruption are merely broad allegations that prove nothing.

Respondents cite a seemingly impressive array of legislative misconduct, made to appear more impressive because the examples are cited repetitiously throughout their Briefs. A closer look at these few instances (and they are all strikingly similar in their lack of substance) reveals that they are nothing more than unfounded allegations of wrongdoing. For instance, the State's oft-repeated tobacco check example, Sorrell Br. 3, 6, 19, 21,

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abridging the free speech of those not employed by traditional, established media outlets. This cannot be the law.

Democratic Party of United States v. National Conservative Political Action Committee, 578 F. Supp. 797, 831 (D. Pa. 1983).

If newspaper articles alone suffice to show a problem with corruption or even the appearance of corruption, then "the appearance of corruption is not merely a blank check, but an endlessly refilled bank account for those who seek greater regulation." Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, CATO Supreme Court Review, 2002-2003, at 187, 200.

consists of tobacco checks in the amount of *$40* given to officeholders *after* defeat of a tobacco-related bill. Tr. VII-63. This utterly fails to prove corruption; rather, it is an example of a well-known political truth – contributors give to candidates with whom they agree. As Representative Karen Kitzmiller complained, "the tobacco industry . . . freely give[s] contributions to people *who support their views*," but she could not say "whether votes are changed because of that." Tr. X-180 (emphasis added). If this is corruption, then candidates will be forced to accept contributions only from those with whom they disagree, with a resulting shortage of likely donors. Furthermore, contributions of $40 remain lawful even after the imposition of Vermont's "laughably low" limits, so the contribution limits do not solve this "problem" of contributors donating to candidates who support their views. Moreover, no regulation can prevent this "problem," unless contributions are outlawed altogether.

Another example the State offers as "proof" of corruption is the bottle bill vote. Sorrell Br. 2, 6, 19, 44; VPIRG Br. 12. For all of the discussion and citations to the incident, however, the worst Senator Ready could testify to was that bottle industry contributors were "trying to dispose party leadership and the people who are running for office in a friendly way toward their issue." Tr. IX-109. The bill did not pass and an old farmer, one of her constituents, called to tell her he could not believe it was not passing. It was "frustrating" to him. Tr. IX-110. Finally, Alice Bassett stated that the bottle bill "got nowhere" and that the wine lobby was too strong, but when questioned about whether the wine lobby had actually contributed to any members, she said, "I can't say that they were paid. They probably were not." Ex. II, E-0426.

Senator Ready testified about the slate quarry exemption matter, Sorrell Br. 3, 6, 20, 45; VPIRG Br. 12,

44, and in at least 19 pages of testimony, as to the $500 contributions only found it "odd" that committee members studying the issue would be given contributions by quarry owners. She conceded that the officeholders were not corrupt – "I can tell you [members of the committee studying the issue] John Bloomer, Curt McCormack, none of these people is for sale. They are people that have distinguished records, and a high moral standard." Tr. IX-94-95. "And I want to be very, very clear that I am not saying here that senator A, B, C, or D or representative A, B, C or D took money and therefore had a specific vote." Tr. IX-104.

The State also points to a vote on a bill that would have allowed optometrists to administer eye drops. Sorrell Br. 19; VPIRG Br. 12-13. The State quotes Peter Smith bemoaning the fact that "there were lobbyists and individual doctors . . . all over the statehouse." Tr. VIII-41. Smith admitted that he did not know specifically of any contributions given to senators over the eye drop issue, nor did he recall receiving such contributions himself around the time of the vote and said he voted his conscience. Tr. VIII-86-87.

Instead of evidence of perceived or actual corruption, the Respondents' Briefs are full of conclusory statements and hyperbole. For instance, the State claims that Plaintiffs' witnesses "recognized the public's concern over the corrupting effect of money in politics." Sorrell Br. 7. What the State fails to explain is that William Meub, the one witness cited by the State for that proposition, testified that the public might perceive such a problem with contributions of "an *unlimited* amount." Tr. IV-66-67 (emphasis added).

None of the incidents cited establishes the existence or even the perception of corruption. Thus, the State has failed to meet its burden to show that prevention of real or apparent corruption is a compelling interest in Ver-

mont that would justify such low contribution limits.

B. The record demonstrates that, without evidence, corruption from such low contribution limits should not be presumed.

Without record evidence of corruption resulting from contributions this low, corruption should not be presumed. The relationship between contributions and corruption continues to be controversial. Stanley C. Brubaker, *The Limits of Campaign Spending Limits*, 133 Public Interest 33, 46 (1998) ("[P]olitical scientists consistently find that the interests of constituents, the concerns of political parties, and the politician's philosophy have more influence on how he votes than do mere campaign contributions."). "Literally decades of studies have consistently failed to find evidence that campaign contributions purchase special favors on any type of systematic basis." Smith, *supra*, at 187, 197-98 (citing Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. Econ. Perspectives 105, 113, Table 1 (2003) (summarizing results of 36 major studies)). "Supporters of the 'contributions as corruption' thesis continue to produce anecdotal evidence of specific episodes of 'corruption.'" *Id.* at 198 (citation omitted). "Anecdotal evidence, however, is generally viewed by the Supreme Court as inadequate to support the infringement of a fundamental right such as speech." *Id.* (citing *Board of Trustees v. Garrett*, 531 U.S. 356, 370 (2001)).

Dr. Lott, Yale University Law School research scholar with a Ph.D. in economics, has written over ten papers on the topic of why incumbent politicians vote the way they do. Tr. III-170. He testified that there is "basically no effect" of contributions on the voting patterns of incumbent officeholders from contributions largely in the $30,000 range. Tr. III-176. He studied 980 congressmen over a period of 15 or 16 years. Tr. III-175. He researched

how those politicians voted during their last term in office when they were not faced with the threat of losing contributions if they voted against the wishes of their contributors, and whether they voted differently than they had previously. Tr. III-172-73. He controlled for whether the incumbent was running for a different office, would be engaged in lobbying, was up for a government appointment, and even whether an officeholder's child was involved in political activity or lobbying. Tr. III-173. His conclusion was that politicians leaving office "continue to vote exactly the same way as they did previously." Tr. III-173. Other papers that have studied the effect of contributions on voting behavior have looked only at correlation, not causation. Tr. III-178.

C. Officeholders in Vermont freely give access to their constituents.

Access is freely given to Vermont citizens. State witness Sen. Ready is an excellent example. She is so accessible that she even has people come into her unlocked house and leave notes on her kitchen table. Tr. IX-165. She has never told any constituent that she was unwilling to talk to them, Tr. IX-166, and, apparently, is available even at her son's soccer games. Tr. IX-167.

Legislators in Vermont will generally see anyone that wants to see them. Tr. VII-28. "Legislators [in Vermont] are accessible . . . even on the floor of the house as they are voting . . . . [A]ccess really isn't worth anything in Vermont because it's prevalent . . . . Citizens see their legislators on a daily basis so they wouldn't have to pay for that access." Tr. IV-180-81.

Of course, access may come in different levels. Access may depend on the size of the district, "the degree of influence of the constituent, whether the person is helpful or always comes with complaints, how often they attempt that access, how conscientious the legislator is, how proficient they are, maybe even the size of the last

election win. If you win in a squeaker, perhaps those legislators would be more responsive than the ones who win by a landslide." Tr. V-118 (Hooper). It is normal human nature for candidates to respond differently to constituents: there is nothing corrupt about this reality.

D. The public perceives Vermont as clean.

David Wilson, whose legislative committee testimony the State favorably cites, Sorrell Br. 2-3, expressed that "the link between a contribution and an outcome in Vermont . . . [has] not yet morally crossed the line where, again, we have the types of problems that I think we've all been reading in the newspapers that exist in other states and certainly in Washington." Ex. II, E-511-12.

Alice Bassett, cited for the allegation that the influence of money helped defeat a bottle bill, Sorrell Br. 2, said in that testimony that "My feeling is having been in the legislature for ten years, that Vermont's lawmakers are – it's a very clean state. I don't think much – many shenanigans go on. In fact, very, very few. I think my pitch for campaign finance reform is more an example to other states where there are many, many problems. I think a good, strong campaign finance reform bill would do a lot to set an example to other states." Ex. II, E-0425.

Neil Randall, another witness cited by the State, when asked if he thought the general public in Vermont has some concern over contributions, stated that he did not see "any case" of cynicism in Vermont, but that he would have a "personal concern" about a contribution from a single contributor that financed a high percentage of his campaign. Tr. IV-258-59. It is true that large contributions can pose the risk of real or apparent corruption, but far from true that meager $200-400 donations pose the same risk.

In fact, Vermonters do not seem to desire the extreme measures of Act 64. William Meub, gubernatorial candidate at the time of trial, testified regarding the people's

perception in Vermont that Act 64 "is clearly perceived as the kind of overregulation and dampening effect, and people have told me to do whatever I can to fight this legislation. So, when they know what it is, they're opposed to it. I haven't found anybody in any group when I have mentioned it, and I have asked for a show of hands, what do people think of it, I haven't found anybody who supports it." Tr. IV-72.

II. The Contribution Limits Are Too Low to Survive Constitutional Scrutiny.

The State claims that "it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded." Sorrell Br. 32. Petitioners wholeheartedly agree. It is *excessive* contributions that can pose the risk of corruption, but Vermont's original $1,000 per election contribution limits were not excessive. However, Vermont's new contribution limits are so "laughably low" that no risk of corruption could reasonably be perceived, as explained above. But they are also unconstitutional because they are too low to allow candidates to mount effective campaigns.

The State seeks to justify its contribution limits based on their effect on the "average" campaign. Sorrell Br. 40 ("Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates."). However, "[t]he average of past expenditures is calculated by including legislative elections that were not seriously contested or perhaps not contested at all – elections in which little communication took place and little was spent." P.A. 236 (Winter, J., dissenting). Any meaningful assessment of the effect of these contribution limits are on those candidates who actually mounted some sort of campaign, particularly competitive ones.

Thus, Plaintiffs' expert Bensen specifically chose to analyze the races that were contested in any meaningful sense, using the $500 minimum required for reporting as

the basis. In the senate races he studied, those who were not required to report were uncontested or only lightly contested. Tr. III-37. There are races where campaigns do not make a difference to the outcome of a race. The State, however, misplaced its focus in analyzing the limits' effects on even uncontested races, which are irrelevant in determining whether contribution limits allow candidates to amass the resources necessary for effective advocacy, the test set out by this Court.

In addition, the State cites the percentage of contributions affected by the limits, rather than the amount of funds. Sorrell Br. 39 (10% of contributions received affected). Since the issue is whether the limits could have a "severe impact on political dialogue," *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), the focus must be the total amount of campaign *funds* that candidates would lose, not the percentage of contributions lost.

III. The State Has Failed to Prove That Its Purported Compelling Interests Justify Limiting Candidates From Spending Money on Their Own Campaigns.

A. The State has failed to prove that preventing real or apparent corruption justifies the expenditure limits here.

Respondents seek to transform the interest in preventing corruption posed by large contributions into an interest supporting expenditure limits. Sorrell Br. 22 ("spending limits directly counter political corruption and its appearance"); VPIRG Br. 6 ("*Buckley* embraced" the anti-corruption interest). However, this Court only "embraced" that interest as to contribution limits, and specifically rejected the interest for expenditure limits. Moreover, *Buckley* held that any "interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." 424 U.S. at 55. As a

result, "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.

The State concedes as much, asserting that spending limits deter corruption by explaining that corruption includes the "use of *donations*," "the wishes of large *contributors*," and "favors that may be given in return for generous *support*," all references to alleged corruption stemming from *contributions*, *not* expenditures. Sorrell Br. 21 (citations omitted) (emphasis added). Thus, the real claim is the dreaded "arms race," where candidates and officials "fearing their opponents' war chests and concerned about being outspent . . . typically grant monied interests *excessive* portions of their limited time." Sorrell Br. 23-24 (emphasis added). The record, however, does not support this contention.

The record, when it does refer to any specific amounts of time fundraising, actually points to brief periods. For instance, Sen. Ready testified to spending an "afternoon" fundraising. Tr. IX-151 ("That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door."); *see also* Tr. IX-167 (Sen. Ready implying that she would "have lunch with or . . . meet with on a Saturday morning . . . [or] spend half of my son's soccer game talking to about their business" with some constituents).

Donald Hooper, cited at VPIRG Br. 17 n.16, indicated that under the prior contribution limits he would spend evenings "hustling campaign money." Tr. V-119. However, in his 1994 run for Vermont secretary of state, he had only 68 contributors who gave over $100. Ex. VI, E-1952-82. Even if he spent one hour per contributor, that would amount to less than 70 hours for his whole statewide campaign, certainly not an "inordinate" amount of time with these contributors.

Finally, the State claims that spending limits will

"relieve the pressure to afford special interest groups undue access and influence." Sorrell Br. 18. Respondents have failed to prove how spending limits will have any effect whatsoever on the giving of "special interest groups." Rather, it is likely that Vermont's spending limits, along with the draconian related expenditure provision, will cause candidates to rely *more* heavily on bundled contributions. Candidates will be reluctant to spend one dime of their meager allocated budget on fundraising costs and thus will be eager to accept the low-cost bundled contributions from "special interests."

Furthermore, *Buckley* specifically addressed "bundling" favorably. The Court, in upholding contribution limits, reasoned that the limits focus on the problem of large contributions while leaving persons free to continue to support candidates, albeit in a limited way. *Buckley*, 424 U.S. at 28. This preserved "the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 29 n.31. Thus, this Court viewed citizens' ability to band together to accentuate their contributions as a positive, not a negative.

B. The interest in incumbent time-protection is not proven.

Even if one sets aside the explicit incumbent-protection nature of this claimed interest, the demands of fundraising by incumbents have not been proven to be "inordinate." And, if it were true, as the State claims and the court below found, that "the demands of seeking campaign dollars *often* force officials and candidates to engage in fundraising rather than attending to their public duties," Sorrell Br. 12 (emphasis added), then there would be ample proof of such specific instances. However, there is not a single example of any incumbent having neglected one of their official duties as a result.

Furthermore, since this claimed interest is essentially

that challengers should be limited to the fundraising time that is convenient for incumbents to do, there needs to be evidence from incumbents on how much time they have available, aside from campaigning and performance of their official duties, for fundraising and how much could be raised during this time. There is no such evidence.

C. The interest in electoral competition has not been demonstrated to support mandatory expenditure limits.

Vermont's spending limits would not promote electoral competition as Respondents contend. Instead, the limits would devastate electoral competition by depriving challengers of funds they need to overcome the advantages of incumbency. As State expert Gross acknowledged, "most research which looks at the effect of spending on the outcome of elections indicate that on a dollar per dollar basis, challengers receive greater benefits from spending than incumbents do." Tr. X-81; *see also* Tr. III-163; Tr. IV-172.

Gross nonetheless thought this impact on challengers could be overcome under some circumstances because, "[i]n some ways, incumbents have a lot more to lose by spending limits simply because, particularly at the congressional level, they tend to have so much more money than challengers . . . if you have $800,000 and your opponent has $550,000, if you impose a $500,000 limit, you have more to lose." Tr. X-84.

However, in Vermont challengers often outspend incumbents so that challengers have more to lose in absolute dollars by spending limits than do incumbents. In Vermont house races, the average spent by house non-incumbents exceeded that spent by incumbents in each of the three election cycles before trial. Ex. III, E-991. Similarly, three incumbent statewide candidates were outspent by their challengers in 1998, Ex. III, E-987-88, and 5 of the 6 highest spenders in the last two campaigns

for senate from Chittenden County have been challengers. Ex. IV, E-1305-06.[2]

Thus, the record demonstrates that Vermont's expenditures limits will not only *not* promote electoral competition; they will devastate it.

IV. The Spending Limits Are Not Narrowly Tailored.

The State comments that "the district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont," calling those claims 'wholly unreasonable.'" Sorrell Br. 9. However, this Court reviews constitutional claims *de novo* and is not bound by the district court's findings.[3] Thus, this Court must independently examine the facts and the record demonstrates that the expenditure limits here are much too low.

The record clearly supports that these amounts are necessary for effective statewide campaigns. First, Kathy

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[2]Moreover, the small reduction in the expenditure limits for incumbent candidates does not alleviate this problem of incumbent advantage. "[T]here's no possible depreciation rate that I have found or anybody else has found that would be large enough to make that small 15 percent or ten percent reduction sufficient to offset this – this huge amount of reputation that the incumbent has already relative to the challenger." Tr. III-170 (Dr. Lott).

[3]This Court requires that "the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). Specifically, and as the Second Circuit's opinion below recognized, "the District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review." P.A. 111a. This is especially true in the First Amendment context. *See Bose Corp. V. Consumers Union*, 466 U.S. 485, 501 (1984); *Sullivan*, 376 U.S. at 284-86.

Summers, campaign manager for gubernatorial candidate Ruth Dwyer, testified that Dwyer would need between $600,000 and $800,000 in her race. Tr. IV-81; VRSC Br. 19, 40, 42. Second, spending in the last three election cycles have proven that the district court's judgment was wrong. In the 2004 Vermont gubernatorial race, Jim Douglas spent $681,662 and Peter Clavelle spent $502,537. *See* Randall Br. Appendix. In 2002, Douglas spent $1.1 million and Doug Racine spent $723,907. *Id.* In 2000, Howard Dean spent $946,443 and Ruth Dwyer spent $899,581. *Id.* Third, even in 1998, two years before trial, Dean spent $657,065, more than twice the limits. *Id.* Clearly Vermont's statewide expenditure limits are woefully inadequate.

Further, the State claims that the expenditure limits for legislative candidates are adequate, since spending in House races were "less than the Act 64 spending limits *on average*," VPIRG Br. 27 (emphasis added), and since Senate "*average* spending" was less than the limits "in all types of districts save for single-member districts." *Id.* at 28. While *average* spending of *all* legislative candidates is an improper measure of the effect of these limits on candidate campaigns, spending since the district court's decision has proven it wrong. House *average* spending was $2,528 in 2000, $1,998 in 2002, and $2,883 in 2004 and Senate *average* spending in *all* races was $14,458 in 2000, $11,114 in 2002, and $12,463 in 2004. The Institute on Money in State Politics, *2000 State Election Overview* 5, *2002 State Elections Overview* 4, *2004 State Elections Overview* 4, available at http://followthemoney.org/Research.

V. There Is No Evidence That Parties in Vermont Are Corrupt by Acting as Conduits for Contributions from Donors to Candidates.

The only evidence offered by the State that parties "sell access to and influence over candidates and officials

in return for contributions" Sorrell Br. 44, is (1) that political parties in Vermont offer access to candidates at fundraisers, and that lobbyists are present at fundraisers, *id.*, (2) that industry donors give money to parties, *id.* at 44-45, and (3) that one of the Plaintiffs "shifted his donations to his party because of Act 64's limit on candidate contributions." *Id.* at 46. These examples prove nothing and fall far short of the evidence in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). That case found that the national Democratic Party used "tallying" to connect donors to candidates and also found that donors were informed that they could contribute to candidates via a contribution to the party. *Id.* at 459.

VI. Approval of These "Laughably" Low Contribution and Expenditure Limits Requires This Court to Accept a Radically Different View of Candidate Campaigns, the Compelling Governmental Interest in Preventing Corruption, and Ultimately the First Amendment Itself.

As the State's amici make clear, this case is not about the peculiarities of Vermont, but about a radical new vision of candidate campaigns, of the compelling governmental interest in preventing corruption, and of the First Amendment itself. This new vision is fundamentally at odds with the record, American experience and any reasonable interpretation of the First Amendment.[4]

A. Candidate Campaigns.

Respondents' favorite term for candidate campaigns is "arms race," Sorrell Br. 7, 17; VPIRG Br. 3, 10, 11, 15, 21, which is an analogy to military armament spending,

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[4]For a concise explanation of and justification for this new vision, *see* Ronald Dworkin, *The Curse of American Politics*, 43 The New York Review of Books (1996),available at http://www.lnybooks.com/articles/1388. For a similarly concise refutation, *see* Brubaker, *supra*.

primarily during the Reagan administration. VPIRG Br. 11 n.8 ("[C]andidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War."). While a nostalgic phrase for some, *see* Burt Neuborne, *Is Money Different?*, 77 Tex. L. Rev. 1609 (1999), most now recognize that the military buildup during the Reagan administration was not mindless, but a key factor in the collapse of the Soviet Union.

Similarly, candidate fundraising and spending is also not mindless. *See* VPIRG Br. 11 ("[W]hile it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more.") (emphasis in original). First, the State readily concedes that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country," Sorrell Br. 8 ("Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43."); VIPIRG Br. 30 (same); *id.* at 23 n.22 (describing House races as "very low-budget races"), because of "Vermont's small population and intimate campaigning style." *Id.* at 45. Nor do these low cost campaigns generate much fundraising pressure. VPIRG Br. 44 (Under the prior contribution limits, "a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign.").

Second, there are reasons for the rising costs of campaigns, including population growth, the expanding scope of government, the level of competition between the political parties, and the changing means and conditions of effective campaigning. Vermont has experienced this growth, as set forth above, particularly in competition between the political parties, with the Republicans

seizing control of the Vermont House in 2000 and the governorship in 2002 and 2004.

Third, campaign spending is necessary for voter education and has that effect. The American people's political knowledge base is abysmal. Only 33% of adults over 26 know which political party controls their state legislature. National Conference of State Legislatures, *Citizenship: A Challenge for All Generations* 7 (2003), available at http://www.ncsl.org/public/trust/citizenship.pdf. Increased campaign spending produces knowledge increases across the population spectrum. John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Politics 757 (2000); John J. Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Politics 916 (2001).

Fourth, challengers need financial resources to overcome the advantages of incumbency and they benefit more than incumbents by such spending. Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Science Rev. 469 (1978); Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972-1982*, 47 Pub. Choice 7 (1985); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 Am. J. Pol. Science 334 (1990).

So "arms race" is "a pejorative method of describing competition over voter persuasion, the very heart of the democratic process," P.A. 281a (Winter, J., dissenting), and "refers to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

B. The Compelling Governmental Interest in Preventing Corruption.

The compelling governmental interest in preventing corruption is based on this Court's finding that "sometimes *large* contributions will work actual corruption of

our political system," and that there is "a *corresponding* suspicion among voters." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 (2000) (emphasis added). The State, however, would have this Court reject this formulation, in favor of a much broader one, in two ways: (1) by defining a "large" contribution to be a de minimis one, and (2) by separating perceived corruption from actual corruption.

First, the State claims that the contribution limits here "are directed at amounts considered 'suspiciously large.'" Sorrell Br. 14; *id.* at 9, 38 (same); VPIRG Br. 43 (same). It has already been demonstrated, by a review of the evidence, that there is no evidence that these contribution limits address amounts that are *suspiciously* large. VRSC Br. 8-9. But these contribution limits are not large by any measure. In 1974, Congress adopted the $1,000 per election contribution limits approved in *Buckley*. Adjusted for inflation, this limit would be $3,961.46 in today's dollars, Bureau of Labor Statistics, CPI Inflation Calculator, http://data.bls.gov?cgi-bin/cpicalc.pl (last visited Feb. 20, 2006), or $7,962.92 for the election cycle. This is twenty times larger than Vermont's highest limit. In 1974 dollars, Vermont's highest contribution limit, adjusted to be per election, would be worth $50.48, *id.*, versus *Buckley's* approved limit of $1,000. $50.46 would have been considered small in 1974, not, by any measure, large.

Second, the State claims that its contribution limits may be justified by perceived corruption, absent actual corruption from contributions at these low limits. Sorrell Br. 33, VPIRG Br. 41. But it is well established that there is an underlying suspicion about politicians in America that precedes our founding and continues to today. The American National Election Studies, *Are Governmental Officials Crooked 1958-2004*, http://www.umich.edu/~nes/nesguide/toptable/tab5a_4.htm (last visited Feb. 20,

2006) (finding that from 1958-2004 24% to 35% of the American people believed that "quite a few" politicians were crooked, and only 26% to 10% thought that "hardly any" were). If perceived corruption were enough, government would have unbridled power to regulate campaigns.

C. The First Amendment.

Finally, Respondents ask this Court to reverse decades of its jurisprudence and find that the expenditure limits are not content-based regulations of speech, and are thus subject to lower scrutiny. VPIRG Br. 36-39. In *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), this Court found that limiting candidates' speech to certain pre-approved subjects is content-based. Since it is only expenditures "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates," 17 V.S.A. § 2801(3), that are subject to the expenditure limits, "by any commonsense understanding of the term," they are content-based. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429(1993)."Indeed, were . . . expenditure limitation[s] unrelated to the content of expression, there would have been no perceived need for Congress [in enacting the expenditure limits struck in *Buckley*] to 'equalize the relative ability' of interested individuals to influence elections." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) (quoting *Buckley*, 424 U.S. 1, 48 (1976)).

VII. The Presumption of Coordination Is Unconstitutional.

The State argues that Section 2809(d)'s mandatory rebuttable presumption of coordination is constitutional because, under Vermont law, the presumption merely shifts the burden of *production*, not the ultimate burden of *persuasion*. Sorrell Br. 48. Even if this is true, Section 2809(d) is still unconstitutional, because this Court's cases teach that mandatory rebuttable presumptions

violate due process even if the ultimate burden of persuasion remains with the State.

Vermont Evidence Rule 301(c)(1) provides that in cases of civil presumptions, the jury is required to find the existence of the presumed fact, "[i]f the evidence of the basic fact is such that no reasonable juror could find the nonexistence of that fact and if the party against whom the presumption operates has not met the production burden imposed on him" by the civil presumption. This Court's cases, however, hold that, in the criminal law context, shifting the burden of production through the use of a mandatory presumption violates Due Process. *See County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157-58 and n.16 (1979). Similarly, the First Amendment require that "speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *see also Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (stating that civil presumptions affecting "important liberties cognizable under the Constitution" are accorded the same Due Process scrutiny as criminal law presumptions). The presumption here violates this requirement.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A Sections 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.[5]

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[5]The State is not entitled to a reversal of the decision below remanding the expenditure limits to the district court to determine if they are narrowly tailored, Sorrell Br. 50, because this was not raised in their Conditional Cross-Petition.

Respectfully submitted,

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